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No. 90-1708

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

BENTON MUSSLEWHITE
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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LIST OF PARTIES

The parties in the Texas courts were the parties listed in the caption to the Petition.

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OPINIONS BELOW

The opinion of the Fourteenth Court of Appeals of the State of Texas is reported at 786 S.W.2d 437 (Tex.App.--Houston [14th] 1990, writ denied), and is reprinted in Petitioner's Appendix A of Petition, at 1a-15a.

On November 28, 1990, the Supreme Court of Texas denied petitioner's application for writ of error to the Fourteenth Court of Appeals. That Order is reprinted in Appendix E, at 50a-51a. On February 6, 1991, the Supreme Court of Texas denied petitioner's timely motion for rehearing of the application for writ of error. That Order is reprinted in Petitioner's Appendix F, at 52a-53a.

OBJECTION TO JURISDICTION

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons thereof. Supreme Court Rule 17.

Respondent, the State Bar of Texas, submits that while neither controlling nor fully measuring the Court's discretion, Petitioner Musslewhite has not met any of the character of reasons set forth in Rule 17(b)(c) to invoke the jurisdiction of this Court.

Neither the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, Houston, Texas in its published opinion, nor the Texas Supreme Court in refusing to grant Musslewhite application for writ of error either (a) decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of

appeals; or (b) decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The case at hand involves the suspension of an attorney from the practice of law resulting from the revocation of an agreed judgment of probated suspension for violations of the probationary terms of the agreed judgment. The decision of the trial court which was affirmed on appeal found that Petitioner Musslewhite violated DR 2-101 by engaging in false and misleading advertising and for taking on a new client during a time when he was prohibited from doing so.

The judgment of the Court of Appeals correctly found that Musslewhite was disciplined for false and misleading communications to victims of the Piper Alpha tragedy and not for communications with other

lawyers. In that vein, the Court addressed Musslewhite's First Amendment claim squarely within the guidelines of Bates v. State Bar of Arizona, 433 U.S. 550 (1977) and other Supreme Court cases on advertising. Musslewhite's contention that this case involves one of first impression with the application of State Bar disciplinary rules on advertising to communications "between attorneys" is simply untrue. Musslewhite is attempting to retry the disciplinary suit in this Court by having this Court reexamine the evidence introduced at trial.

Furthermore, Musslewhite has not complied with Supreme Court Rule 21(h) of the Rules of the Supreme Court which provides as follows:

> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific

> portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Musslewhite also attempts to invoke this Court's jurisdiction by claiming that his right to procedural due process of law was violated in connection with the Hartman matter.

Petitioner submits that Musslewhite has totally failed to comply with Rule 21(h) in his petition for writ of certiorari on this issue. Furthermore, the complaint he raised at the state court level was that the term of the disciplinary judgment he was found to have violated (taking on of new clients) was unconstitutionally vague. The Court of Appeals correctly found that the vagueness doctrine did not apply to a judgment on a

disciplinary action to which Musslewhite agreed (but rather to a "regulation").

For the reasons stated above, Musslewhite's Petition for Writ of Certiorari should be denied for want of jurisdiction.

All references in this brief will be to matters contained in the record submitted to the Court of Appeals and Supreme Court of Texas and shall be labeled as (T.) (pleadings and exhibits filed), and (S.F.)(testimony at trial). As of this date, this record has not been filed with this Court.

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

On November 10, 1987, Honorable Solomon Casseb, Jr. ("Judge Casseb") called the disciplinary actions against Musslewhite to trial. The underlying disciplinary actions accused Musslewhite of three serious client neglects, attempting to pay off a complaining witness, communicating with a party represented by counsel, solicitation through the use of runners, and impoprer selling off of fee interests. Petitioners in those actions, the Grievance Committees for the State Bar District Nos. 4-A and 4-C, State Bar of Texas, appeared by counsel and by the District 4-C Grievance Committee chairman, and Musslewhite appeared in person and by counsel. Counsel for Petitioners announced ready for trial and counsel for Musslewhite announced not ready for trial. After Judge Casseb overruled Musslewhite's motion for continunace

along with various other dilatory motions, Musslewhite sought to enter into settlement negotiations. Judge Casseb permitted the parties to discuss prospective settlement and the parties thereafter announced to Judge Casseb in open court a settlement of the disciplinary actions.

On January 29, 1988, Judge Casseb signed a Judgment in conformity with the agreement of the parties. The Judgment provides in pertinent part:

> IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days beginning on November 1, 1988, and ending on January 30, 1989.
>
> IT IS FURTHER ORDERED that the Court may upon written request of Respondent showing good cause and with recommendation of the custodian, hereafter enter an order delaying commencement of the ninety (90) days suspension until no later than August 1, 1989.
>
> IT IS FURTHER ORDERED that Respondent shall not practice law or represent himself to be an attorney during the ninety (90) day suspension.

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respnodent shall be placed on probation for a period of three (3) years commencing on February 1, 1988, and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional miscondcut as defined by the State Bar Rules art. X, §7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential clients to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioners, and Hartley Hampton to a full and complete list of all clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

On July 19, 1988, the court-appointed custodian over Musslewhite's law practice, Hartley Hampton, and the State Bar of Texas, by and through its Office of General Counsel, filed a Motion to Conduct Oral Hearing with respect to Musslewhite's activities concerning the Piper Alpha tragedy in Scotland and concerning the filing of the Hartman lawsuit. Judge Casseb thereafter set such motion for hearing for September 18, 1988. Judge Casseb also ordered that the movants be permitted to engage in discovery. After discovery, the State Bar of Texas filed its Motion to Revoke Probation on September 12, 1988. Such motion raised the same issues as in the prior motion.

On September 20, 1988, Judge Casseb commenced receiving evidence on the Motion to Conduct Oral Hearing and then on the Motion to Revoke Probation. At the conclusion of proceedings on that day, Judge Casseb continued the matter over to October 17, 1988. On October 17 and 18, 1988, Judge Casseb received all the evidence Musslewhite or his counsel had to offer concerning the Motion to Revoke Probation.

By letter dated October 19, 1988, Judge Casseb granted the Motion to Revoke Probation, permitted Musslewhite to participate in a certain trial, and suspended Musslewhite from the practice of law for three (3) years, beginning December 1, 1988. On November 7, 1988, Judge Casseb heard Musslewhite's motions to conduct hearing on punishment, to reconsider, for rehearing and reconsideration, and to delay imposition of suspension. Judge Casseb overruled Musslewhite's motions, and

suspended Musslewhite from the practice of law for three (3) years, beginning January 31, 1989, so that Musslewhite could participate in a certain trial.

On November 21, 1988, Judge Casseb signed an Order Revoking Probation and imposing suspension for three (3) years, commencing January 31, 1989. Judge Casseb signed Findings of Fact and Conclusions of Law on December 27, 1988, and December 29, 1988.

REASONS FOR DENYING THE WRIT

I.

THE TEXAS COURTS DID NOT ERR IN UPHOLDING THE REVOCATION OF MUSSLEWHITE'S PROBATION BASED ON HIS CONDUCT CONCERNING THE PIPER ALPHA TRAGEDY.

In Bates v. State Bar of Arizona, 433 U.S. 350 (1977) the Court held that truthful advertising related to lawful activities is entitled to First Amendment protection, but emphasized that false, deceptive, or misleading advertising remained subject to restraint and held that misleading advertising could be prohibited entirely.

False and deceptive advertising has a great potential for harm and thus a lawyer's right to advertise must be balanced against the Bar's responsibility to protect the public from fraud and deception. The United States Supreme Court has recognized that advertising for professional services poses special risks for deception because the public lacks the

sophistication concerning legal statements and misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376 (1973). Thus, the States and the Federal Government are free to prevent the dissemenation of commercial speech that is false, deceptive, or misleading. Friedman v. Rogers, 440 U.S. 1 (1979).

The Texas Code of Professional Responsibility provides for the minimum standard for attorney conduct with regard to advertising in Canon 2. The applicable Disciplinary Rule which the trial court found Musslewhite to have violated is DR 2-101 (Pet. G; 54a). It provides in part:

DR 2-101. Publicity and Advertising.

(A) A lawyer shall not make on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services. A communication is

false or misleading if it:

(1) Contains a material misrepresentation of fact of law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Contains a statement of opinion as to the quality of legal services;

(3) Contains a representation of implication regarding the quality of legal services which is not susceptible to reasonable verification by the public;

(4) Contains predictions of future success;

(5) Contains statistical data which is not susceptible to reasonable verification by the public;

(6) Contains other information based on past performance which is not susceptible to reasonable verification by the public;

(7) Contains a testimonial about or endorsement of a lawyer;

(8) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve.

(B) A lawyer who publishes, advertises, or broadcasts with regard to any area of the law in which he practices must, with respect to each area of the law so advertised, publish or broadcast the name of the lawyer, licensed to practice law in Texas, who shall be responsible for the performance of the legal service in the area of law so advertised.

(C) Each lawyer whose name is either published, advertised, or broadcast pursuant to DR 2-101(B):

(1) Who has been awarded a Certificate of Special Competence by the Texas Board

of Legal Specialization in the area so advertised must state with respect to each area, "Board Certified, (area of specialization)-Texas Board of Legal Specialization."

(2) Who has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advrrtised must state with respect to each area, "Not certified by the Texas Board of Specialization." Where the area so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area." Such statements must be displayed conspicuously so as to be easily seen or understood by any consumer.

The rule itself speaks to communications about the lawyer or his services and specifically prohibits communications which are false or misleading. The rule goes on to state those factors which can render a communication false or misleading.

The communications made by Musslewhite which led to revocation of his license to

practice law were (1) the news release; (2) statements made at the press conference; (3) an advertisement in a local Aberdeen paper; and (4) an en masse direct mail solicitation campaign sent to the victims and families of victims of the Piper Alpha tradegy.

News Release (Pet. Ap. K; 75a)

The news release which was distributed at the news conference on July 15, 1988, violates DR 2-101 in that it contains false and misleading communications.

The self-laudatory language of a "team of internationally renowned U.S. lawyers based in Houston, Texas" is misleading because it fails to identify any of the lawyers. O'Quinn had not authorized Newman and Musslewhite to speak on his behalf. He merely agreed to accept any case Musslewhite could obtain for him. (S.F. 17, 187, 190). Newman himself admitted that he had never handled any foreign cases. (S.F. 58). The image conjured up by this statement

is one of an assemblage of lawyers proficient in the area of mass disasters standing by ready and willing to represent victims or families of victims involved in the tragedy. In truth, no team really existed. Musslewhite could not accept new cases, Newman had no experience in foreign litigation, and O'Quinn had merely agreed to accept referrals. In fact, Musslewhite admitted that anyone reading the news release would not know who the "team" was. (S.F. 31).

The news release also states that the team "would be working with United Kingdom solicitors to represent the victims or families of victims involved in the Piper Alpha tragedy." This statement is both false and misleading because it suggests that Musslewhite or the team already had Piper Alpha clients, when in fact neither Musslewhite nor the alleged team ever had any Piper Alpha clients. (S.F. 32).

The news release refers to Musslewhite as the "team's lead counsel." This is false and misleading because the release does not disclose that the Judgment of January 28, 1988 prevented Musslewhite from accepting new emloyment by clients and that he would be suspended for ninety days in the future. In addition, the intentions of Musslewhite, O'Quinn and Newman were that O'Quinn would be lead cousel, if not sole counsel. (S.F. 192). The release also suggests that Musslewhite was seeking clients for himself to handle when the true purpose was to secure clients for O'Quinn. (S.F. 187).

Similarly, the quote that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is false and misleading because it never identifies the lawyers, it never discloses that the judgment of January 29, 1988, prevented Musslewhite from accepting new

employment by clients and that he would be suspended for ninety days, the quote is a statement of opinion as the quality of legal services, and the statement is not susceptible to reasonable verification, all in violation of DR 2-101(A)(1) and 1-102(A)(4). Reasonable verification regarding the quality of legal services means verification from sources other than the lawyer making the representation of implication.

Lastly, DR 2-101(C)(2) requires a lawyer who publishes, advertises, or broadcasts with regard to any area of law to include a disclaimer. The press release fails to include a disclaimer and thus violates DR 2-101(C)(2).

At the press conference itself, Musslewhite did not disclose the terms of the Judgment and estimated a range of recovery for wrongful death cases between $1 million and $5 million in Texas State courts. (S.F. 39).

Such predictions of future success are prohibited by the rule and his comments clearly create an unjustified expectation about results that Musslewhite could achieve.

Advertisement (Pet. Ap. L; 77a)

The advertisement which was published in the local Aberdeen paper contains similar misrepresentations in violation of DR 2-101.

Again, the reference to a "team of internationally renowned American lawyers experienced in handling damage claims in mass disaster in the United Sttes of America and Europe" is false and misleading because it never identifies the laweyrs and is not susceptible to reasonable verification by the public.

In addition, the advertisement refers to the "team now in Aberdeen." Musslewhite had alredy left Aberdeen by the time the ad had run. Newman is not an internationally renowned American lawyer experienced in

handling damage claims in mass disasters in the United States of America and Europe and O'Quinn never even went to Scotland.

Furthermore, as with the news release, this advertisement constitutes a publication, advertisement, and broadcast with regard to an area of law in which Musslewhite and Newman practice and the failure to include the disclaimer clearly violates DR 2-101(C)(2).

Letter Mailed to Victims (Pet. Ap. M; 81a)

The July 18, 1988, letter Newman wrote to the victims in concert with Musslewhite is false and misleading.

Once again, the reference to a "group of internationally renowned trial lawyers in the United States" is false and misleading because it never identifies the lawyers and because the statement is not susceptible to reasonable verification by the public.

Furthermore, the statement that the team is "currently having discussions with a number of United Kingdom solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false and misleading because it suggests that the "team" already had Piper Alpha clients when in fact it had none and is false and misleading because it constitutes a prediction of future success.

Thus, the evidence established at trial clearly supports the trial court's decision of a finding of professional misconduct.

II.

Musslewhite's two main contentions as to why his conduct does not violate the rules are (1) the communications were "ultimately" directed to solicitors and (2) Newman acted alone with respect to the advertisement and en masse letter to the victims and families.

Musslewhite's first argument appears to be that since the communications state that the "team's" policy is to work through Scottish or United Kingdom based solicitors that this somehow transforms the solicitations from ones directed to the public into ones really for solicitors. This argument is tenuous at best. Why hold a news conference and issue a press release to reporters if the objective is to merely contact solicitors? It would have been simpler merely to contact these solicitors directly. In fact, the evidence at the hearing indicates that Musslewhite and Newman had already contacted solicitors by telephone and through the mail. (S.F. 60; Pet. Ex. 11 #4, 7). The news conference is the most efficient way to attract the public at large and there can be no other reason why Musslewhite and Newman contacted a public relations consultant except to help them procure cases and to direct their

pleas to the victims and their families. The advertisement is cleary directed towards the victims and families as well as Scottish solicitors who may already have cases and it invites individuals to call Newman directly if they have no solicitors. And it is undisputed that the letters are clearly addressed to victims and their families. (Pet. Ex. 11 ¶13).

Musslewhite's entire publicity scheme was misleading. He knew he could not accept new employment but wanted to be able to receive what he expected to be a considerable amount of referral fees when he procured the cases for O'Quinn. Thus, he engaged in an undertaking whose sole aim was to entice potential victims or their families into believing that scores of Texas lawyers were on hand and would be able to recover up to $5 million for each and everyone. Musslewhite attempts to argue that his failure to mention

his disciplinary suspension was not a material omission of fact because it was not relevant at the time the communication was made, that it was premature, and only became material when a client was procured. But in truth, no mention of it was made because who would contact a lawyer already serving a probated term of suspension. Musslewhite needed to bait these individuals into contacting them and planned on switching his approach once the client had been hooked. He claims he fully disclosed the terms of the disciplinary judgment to all solicitors he spoke to but again in truth he only revealed the information after the adverse publicity surfaced in the Scottish press.

Musslewhite attempts to divorce himself from Newman and asserts that Newman acted alone when in Scotland and specifically with regard to the running of the advertisement and letter mailed to the victims. But the record

is clear that from the onset of their endeavor they operated jointly and in concert to attain their goal of obtaining Piper Alpha clients.

In support of the Musslewhite/Newman connection, the evidence indicated that Musslewhite called Newman and requested he work with him on the project and instructed Newman with respect to applicable law before sending Newman to Scotland. (S.F. 58, 19). Newman went to Scotland at Musslewhite's invitation and it was Musslewhite who provided Newman with a list of solicitors and potential clients to telephone once he arrived. (S.F. 20). Musslewhite needed Newman in Scotland since he could only stay in Aberdeen for a couple of days and Newman reported to Musslewhite his activities during Newman's stay in Scotland. (S.F. 22). When Musslewhite arrived in Scotland, he and Newman went over what had occurred and Newman himself refers to "the plan." (S.F. 65, 76).

Musslewhite says he and Newman made the decision together to send the mass mailout to the solicitors. (S.F. 23). Newman testified that Musslewhite had already written a letter, and wanted to do the mass mailout and the advertisement, and that in fact it was Musslewhite's idea. (S.F. 63, 64). Newman reviewed both the advertisement and letter to victims with Musslewhite before the ad ran in the paper or the letters were mailed. Newman read Musslewhite the language over the telephone. (S.F. 49, 50) (S.F. 50, 70-71) (S.F. 285, 286). Both were done on behalf of the "team." Musslewhite knew of the ad, knew it was going to be run and permitted the running of the advertisement. (S.F. 50, 63, 64). Musswlewhite testified that he did not tell Newman not to run the ad and that it was not a surprise to him that the letter had been sent. (S.F. 50-51). Thus, the evidence clearly establishes that both the running of

the advertisement and the sending of the letter was in continuance of the "plan" to secure Piper Alpha cases that Musslewhite and Newman operated together.

II.

THE TEXAS COURTS DID NOT ERR IN UPHOLDING THE REVOCATION OF MUSSLEWHITE'S PROBATION WITH RESPECT TO THE HARTMAN MATTER.

Musslewhite contends he was not afforded procedural due process at the hearing. Musslewhite misstates the record. On July 19, 1988, the State Bar and Custodian filed their Motion to Conduct Oral Hearing. This motion requested a hearing concerning Musslewhite activities in Scotland and the circumstances surrounding the Hartman case. On July 22, 1988, the State Bar and Custodian filed a Motion to Permit Discovery which states that a hearing was already scheduled for September 19, 1988, and requested permission to engage in discovery in preparation for the evidentiary hearing. Based on the discovery,

the State Bar filed its Motion to Revoke on September 12, 1988.

The evidentiary hearing was held on September 19, 1988, at which time Musslewhite specifically stated he had no objection to going foward. (S.F. 10). On September 20, 1988, the Court allowed the State Bar to put on its case on the Motion to Revoke and thereafter continued the cause to October 17, 1988, to afford Musslewhite the opportnity to complete discovery. Again Musslewhite specifically indicated he had no objection to the procedure. (S.F. 7). Thus, any objection he may have had was waived.

The Agreed Judgment of January 29, 1988, specifically prohibited Musslewhite from accepting new employment by clients until November 1, 1988. Musslewhite's arguments regarding referral fees is misplaced. The issue is not whether he could receive referral fees, but whether his conduct concerning the

Hartmans constitutes the acceptance of new employment. Clearly it does.

The Court of Appeals discussion concerning the Hartman matter is accurate.

The evidence shows that Ronald Lee Hartman and his wife, Katherine H. Hartman, employed Musslewhite in April of 1988 to pursue claims resulting from Mr. Hartman's possible exposure to Agent Orange. Mrs. Hartman executed a Power of Attorney on behalf of Mr. Hartman and herself employing the Law Offices of Benton Musslewhite, Inc. for such purposes. (Pet. Ex. 1; Pet. Ex. 11 #18). Musslewhite admitted to accepting this new employment from the Hartmans as clients and in fact testified that the case had been referred to him from Gwynne Old, a Houston lawyer. (S.F. 54; Cust Ex. 8 p. 154).

Musslewhite then prepared and filed the lawsuit on behalf of the Hartmans on June 22, 1988. (Pet. Ex. 5). This petition was signed

by Musslewhite and designates him as lead counsel under Tex. R. Civ. Pro. 8. Specifically, Rule 8 provides in part that on the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge. The filing of the lawsuit obligated Musslewhite with certain duties and responsibilities to the Hartmans and Musslewhite admitted that by filing the lawsuit he was undertaking a responsibility in the case. (S.F. 295).

Musslewhite argued that the Hartmans were not new clients since he had been constructively representing them since 1979 with the filing of the first Agent Orange lawsuit. Whether the Hartmans were already "constructive" clients, which the State Bar disagrees, is irrelevant. The point is that Musslewhite accepted new employment. Musslewhite admits the lawsuit filed on behalf

of the Hartmans is separate and distinct from the Sharkey litigation. (S.F. 291).

Musslewhite testified that the Hartmans were unknown to him before this. There was no personal service or personal relationship between the Hartmans and Musslewhite, but only a general professional obligation that he will represent them along with the other members of the class to the best of his ability. However, in April of 1988, the circumstances changed.

At that point in time, Mrs. Hartman conferred with Musslewhite about the possibility of representing them and they entered into a contract for emplyment with Musslewhite. There is now a contract between himself and the Hartmans and he removed them from the class and filed an action on their behalf in Jefferson County.

This clearly is new employment which had not been contemplated and would not have been

taken but for the fact that they entered into the power of attorney in April of 1988.

Musslewhite's actions are consistent with a lawyer who has taken on a new case. He attempts to argue that he "referred" the case to Wayne Mansulla and merely "signed them up" in order to receive his referral fee. However, the evidence shows that at most Musslewhite merely associated Mr. Mansulla in the lawsuit. Musslewhite's obligations to the Hartmans never ceased to exist. Musslewhite sent a letter to Mr. Mansulla on June 28, 1988, which was the first writing to or with Mr. Mansulla indicating that Musslewshite wanted Mansulla to work with him on the Hartman lawsuit. (Def. Ex. 8). This letter itself merely refers to Mansulla as the "case manager" and thus indicated that Musslewhite would continue to have responsibility in the case.

In fact, the Hartmans did not execute the second Power of Attorney with Mr. Mansulla until August 2, 1988, and this did not occur until after the Custodian and the State Bar filed their Motion to Conduct Hearing on July 19, 1988. The Mansulla firm subsequently withdrew from the case and Musslewhite remained lead counsel in the Hartman case at the time the trial court's judgment was signed.

But Musslewhite filed the lawsuit prior to associating Mr. Mansulla. At the point of the filing, Musslewhite was the attorney to whom the Court would look to be responsible for the prosecution of the case. He was the one who had professional responsibility for seeing this through the judicial process. The other lawyers whose names he signed by permission were not even members of the Bar of the State of Texas.

It is important to note that the purpose of prohibiting the acceptance of new cases was directly tied to the neglect allegations originally brought against Musslewhite in the underlying disciplinary suit. The consensus was that if a Custodian was appointed to oversee Musslewhite's practice in addition Musslewhite would agree not to take on any new cases then perhaps Musslewhite could concentrate on serving the needs of his current clients with current matters. (S.F. 225, 225). This agreement was made in order to protect both Musslewhite from future allegations of misconduct and to protect future clients from facing a situation in which their cases were being neglected.

Musslewhite spends a considerable amount of time focusing on the "referral clause." He continues to argue that he only signed up the Hartmans so that he could get his referral fee which the agreed judgment allowed him to do.

He argues that a power of attorney and an attorney-client relationship is required before a referral can be made from the referring lawyer to the referral attorney and cites Disciplinary Rule 2-107 (Pet. Ap. G; 55a). DR 2-107 is entitled "Division of Fees Among Lawyers." It provides in part:

> (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office unless
>
> (1) The division is made in proportion to the services performed and responsibility assumed by each, or is made with a forwarding lawyer. (Emphasis added).

There is no requirement that an attorney-client relationship be established before a division of fees is made. It simply is not contemplated by the rule.

Again Musslewhite attempts to shift the focus of this case to an issue that is not relevant to the revocation proceeding. Whether he received a referral fee is not the issue but rather did he accept new employment.

Therefore, whether he followed custom and practice is not relevant.

Thus, the evidence clearly establishes the acceptance of new employment in violation of the agreed judgment and the terms of probation.

Musslewhite also contends that the restriction on employment is an unauthorized sanction.

Once again, the judgment entered by the trial court was in conformity with the agreement of the parties. This case involves an agreed judgment whereby Musslewhite and the State Bar negotiated the sanction of a ninety (90) day actual suspension followed by a three (3) year probated suspension.

Thus, the negotiated discipline is the actual suspension followed by the probated suspension. Suspension both actual and probated is clearly provided in the State Bar Rules. What Musslewhite is really complaining

about are the terms of probation. All probated sanctions possess specific terms to which an attorney must comply or else face the possibility of revocation of his license. Terms of probation in disciplinary cases can include anything from requirememts of additional minimum continuing education hours, specified hours of community service, regular audits of trust accounts, etc. Musslewhite agreed to the terms in his probation, one of which was the prohibition of new employment. There is no evidence that the agreement was made under fraud or duress. The judgment was the result of the settlement between the parties on the underlying disciplinary lawsuit. Naturally, it places "restrictions" on his license to practice law. It's a sanction - that's its purpose.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that

Petitioner's Application for Certiorari is denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent In Opposition to Petition for Writ of Certiorari has been served on William J. Murphy, attorney of record for Benton Musslewhite, Seventh Floor, 100 Light St., Baltimore, Maryland 21202, by delivery of a true copy to him by certified mail, return receipt requested, by depositing same in a properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 5th day of June, 1991.

Linda A. Acevedo